

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ZIPPORAH FILMS, INC.,

4 PLAINTIFF,

5 -AGAINST-

6 MADISON SQUARE GARDEN, L.P.,
7 MADISON SQUARE GARDEN CENTER, INC.,

8 DEFENDANTS.
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CASE NO. 06 CV 6451 (DC)

ELECTRONICALLY FILED

12 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SEAL**
13 **EXHIBIT D TO THE COMPLAINT**

14 Defendant and Counterclaimant Madison Square Garden, L.P. ("MSG") submits this
15 reply in support of its Motion to Seal Exhibit D to the Complaint. For the reasons that follow,
16 Plaintiff Zipporah Films, Inc.'s ("Zipporah") arguments for unsealing Zipporah's purported
17 documentary (the "Film") should not be credited.

18 Lifting the seal now, after MSG has already demonstrated good cause for the Court to
19 order a temporary seal, would defeat MSG's claim on the merits by rendering the contractual
20 rights of MSG and its third party clients meaningless. Zipporah failed in its Opposition to
21 identify the relative harm in leaving the seal in place at least until this dispute is resolved.
22 Indeed, each of Zipporah's proffered justifications for unsealing the Film are without merit:

23 1) First, Zipporah argues that the Film has already been released to third parties, and thus
24 MSG has waived any right to confidentiality. MSG sent the Film to certain third party clients for
25 the purpose of enabling them to protect their own proprietary rights from being exploited without
26 their approval. MSG never made the Film available to the general public. Further, MSG's third
27 party clients undoubtedly understood that they were prohibited from publishing the Film, given
28 that they had no claim to the copyright rights therein.

1 2) Second, Zipporah claims that MSG has not met the legal standard for sealing the Film.
2 Zipporah mistakes this for a First Amendment case. The parties' August 11, 1997 agreement
3 (the "Agreement") makes clear that MSG has the contractual right to withhold approval of the
4 exhibition or distribution of the Film until Zipporah removes any information MSG deems
5 confidential. Even if a presumption of public access to the Film exists, the potential harm to
6 MSG resulting from its disclosure before trial far outweighs any benefit to lifting the seal now.

7
8 3) Last, Zipporah asserts that MSG's argument is premised on the view that the Clerk's
9 office would allow citizens to illegally copy the DVD of the Film. On the contrary, like all other
10 matter filed in this Court, the public would have a right to access it absent the seal.

11 **I. MSG DID NOT PUBLICLY DISTRIBUTE THE FILM**

12 The notion that MSG waived any right to confidentiality by assisting Zipporah in its
13 attempt to obtain necessary third party consents defies common sense. MSG sent copies of the
14 Film to third party clients pursuant to a contract that *required* those parties to view it. MSG did
15 so on Zipporah's behalf, and at Zipporah's request, for the sole purpose of determining whether
16 or not those third parties would permit the inclusion of their likenesses or proprietary events in
17 the Film. Decl. of Robert A. Brandon at ¶ 13. The letters accompanying those copies show that
18 the exhibition or distribution of the Film for any purpose other than providing or denying the
19 aforementioned consent would violate the copyrights of Zipporah and other parties. *See* Exhibit
20 A to Zipporah Opposition. For example, MSG reminded its clients that Zipporah needed to
21 obtain written consent "from [each third party client] *and other third parties*" before the Film
22 could be distributed. *Id.* at ZFI 0558. MSG further stated that Mr. Wiseman had "authorized us
23 to forward the enclosed copy to you." *Id.* at ZFI 0559. MSG's clients certainly understood that
24 they too would need authorization from Mr. Wiseman and others in order to legally distribute the
25 Film to the public. Wiseman has produced no evidence either that MSG's clients had a different
26 understanding or that any of them actually distributed the Film to third parties .

27 The cases Zipporah cites in support of its "waiver" argument are inapposite. In *Sherwin*
28 *Williams v. Spitzer*, the Court determined confidentiality had been waived where any member of

1 the public could collect the information at issue on the Internet. 2005 WL 2128938, *12-14
2 (N.D.N.Y. 2005). That is not the situation here. Indeed, it is exactly what MSG hopes to avoid.
3 Similarly, *Gambale v. Deutsche Bank AG* involved settlement information that was mistakenly
4 included in a judicial order and was subsequently available on the “highly accessible databases
5 of Westlaw and Lexis and ... disseminated prominently elsewhere.” 377 F.3d 133, 144 (2d Cir.
6 2004). By contrast, MSG delivered the Film only to the parties who had to approve it *before* it
7 could be publicly disclosed. There was no waiver of confidentiality. MSG acted only to
8 preserve the proprietary rights of its clients.
9

10 **II. THERE IS GOOD CAUSE TO MAINTAIN THE SEAL**

11 **A. Public Disclosure of the Film Would Defeat MSG's Claim on the Merits**

12 Zipporah makes much of the supposed right of access to the Film, but the truth is that
13 most of the footage is irrelevant to the dispute here. At the heart of the case are only scenes to
14 which MSG objects and/or for which permissions have not been obtained. Therefore, the public
15 right of access, which attaches only to documents useful to the judicial process, does not
16 automatically apply to the entire film, certainly not at this stage. *See U.S. v. Amodeo*, 44 F.3d
17 141, 145 (2d Cir. 1995) (*Amodeo I*) (a document must be useful in the judicial process for
18 presumption of access to apply).

19 Even if there is a presumption of public access to the Film, the Court has “considerable
20 discretion in determining whether good cause exists” to overcome it. *Geller v. Branick Intern.*
21 *Realty Corp.*, 212 F.3d 734, 738 (2d Cir. 2000). MSG has already shown good cause for the
22 Court to seal the Film. First, the Film contains several scenes covering high level meetings
23 among MSG senior executives. Decl. of Robert A. Brandon at ¶ 10. These discussions include
24 labor relations strategies and characterizations of MSG employees, which, if revealed, could
25 result in immediate and lasting damage to MSG’s business. *Id.* at ¶¶ 10, 15. Far from being a
26 matter of mere embarrassment, the disclosure of these scenes could alienate employees and
27 disadvantage MSG in future labor negotiations. *Id.* Even though it was not required to do so
28

1 under the terms of the Agreement, MSG attempted to negotiate edits to the scenes that would
2 satisfy both parties, and was rebuffed. *Id.* at ¶ 14.

3 Second, the Film is rife with scenes portraying the likenesses or proprietary events of
4 MSG clients from whom Zipporah never obtained the necessary written consent. *Id.* MSG has
5 standard license agreements with these clients, which, in relevant part, prohibit any “electronic
6 media exploitation” of their events without the prior written consent of both parties. Decl. of
7 Jonathan D. Marcus at ¶ 3. Accordingly, MSG’s clients certainly had an expectation and were
8 given express assurances that they would have the opportunity to review any proprietary material
9 before Zipporah included it in the Film. The disclosure of the Film could irreparably damage
10 MSG’s relationships with these clients and conceivably lead to additional litigation. Decl. of
11 Robert A. Brandon at ¶ 12.

12
13 **B. Zipporah Understood its Contractual Obligations**

14 By arguing that the Agreement did not specifically mention Zipporah’s obligation to
15 obtain post filming written consent from third parties, Zipporah misses the point. The
16 Agreement is much broader than that. Zipporah had the sole responsibility to obtain *any*
17 necessary consent. See Complaint, Exhibit A, at ¶¶ 4, 7. Mr. Wiseman knew exactly what was
18 expected of him, and it went beyond simply getting permission to turn on his cameras. Decl. of
19 Bobby Goldwater at ¶ 4. Bobby Goldwater, who Mr. Wiseman acknowledges was his primary
20 contact at MSG, reminded him of Zipporah’s obligation to seek out event promoters and/or
21 producers *after* filming in order to obtain the required written consent. *Id.* In fact, Mr. Wiseman
22 and his crew gained access to various events at Madison Square Garden precisely because event
23 promoters expected and were assured that they would ultimately have the opportunity to approve
24 the use of any proprietary footage in the Film. *Id.* Indeed, event promoters later confirmed this
25 expectation to Zipporah in writing. Decl. of Jonathan D. Marcus at ¶ 4. At no time did Mr.
26 Goldwater inform Mr. Wiseman that the necessary consent of third parties had been obtained on
27 Zipporah’s behalf. Decl. of Bobby Goldwater at ¶ 5.
28

III. Lifting the Seal Would Allow Widespread Public Access to the Film

As a last resort, Zipporah contends that “[t]here is no basis in law or fact” for MSG’s concern that lifting the temporary seal could potentially lead to any member of the public viewing the Film or, in the worst case scenario, copying the Film and disseminating it on the Internet or otherwise. Zipporah Opposition, at p. 2. Zipporah is wrong. Members of the public have “a general right to inspect and copy public records and documents, including judicial records and documents.” *U.S. v. Amodio*, 44 F.3d 141, 145 (2d Cir. 1995). That right is not limited to paper documents. The Court’s official website states: “Court records may be requested for viewing and copying between the hours of 8:30 a.m. and 4:30 p.m.” http://www1.nysd.uscourts.gov/cases_request_records.php. Moreover, the Clerk of Court’s office confirmed that simply by posting some form of collateral, a member of the public would be able to temporarily remove the unsealed DVD from the courthouse file in order to make a copy of the Film. Decl. of Jonathan D. Marcus at ¶ 5.

IV. CONCLUSION

For the foregoing reasons, MSG respectfully requests that its Motion to Seal Exhibit D to the Complaint be granted.

Dated: January 29, 2007
New York, New York

Respectfully submitted,

QUINN EMANUEL URQUHART
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